BEFORE THE SHORELINES HEARINGS BOARD
AND POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

NOOKSACK INDIAN TRIBE, Appellant, v. STATE OF WASHINGTON, OF ECOLOGY, WHATCOM COUNTY, AND WARM CREEK HYDRO, INC. Respondents,	)	SHB NO. 95-1 PCHB NO. 94-148 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A final hearing in this matter before the Pollution Control Hearings Board (PCHB) and Shorelines Hearings Board (SHB) was held in Bellingham, Washington on July 21, 1995, and in Lacey, Washington from July 25 through July 28, 1995. The PCHB was comprised of Robert V. Jensen, presiding, James A. Tupper, Jr., and Richard C. Kelley. The SHB was comprised of Robert V. Jensen, presiding, James A. Tupper, Jr., Richard C. Kelley, Bobbi Krebs-McMullen, Dave Wolfenbarger and Robert Patrick. On the first day of the hearing the SHB conducted a site visit of the proposed diversion point and viewed Warm Creek from Forest Service Road No. 38.

Court reporting services were provided by Gene Barker & Associates of Olympia, Washington.

Appellant appeared by and through its attorney, Jeffrey Jon Bodé. The Department of Ecology appeared by and through Assistant Attorney General Mark C. Jobson. Hydro West

Group, Inc., and Warm Creek Hydro, Inc., appeared by through its attorneys James Hanken and the firm Schwabe, Williamson Ferguson & Burdell. Whatcom County did not appear or participate in the hearing.

Having considered the evidence and testimony offered by the parties, the board enters the following

I.

Location of Project

The proposed project is located on the lower reaches of Warm Creek, a tributary of the Middle Fork of the Nooksack River within Whatcom County in northwestern Washington. The nearest incorporated Town to the project is Deming which lies approximately seventeen road miles to the northwest. The Middle Fork of the Nooksack River originates in the Deming Glacier on Mt. Baker and flows 17 miles to its confluence with the North Fork. Warm Creek enters the north side of the Middle Fork at River Mile (RM) 12.5. A City of Bellingham water supply diversion dam is located approximately 5 miles downstream from Warm Creek at RM 7.5.

The project boundary includes approximately 13 acres consisting of a diversion and intake structure, pipe and penstock and powerhouse. The Warm Creek drainage basin covers an area of 5.2 square miles. The basin originates is U.S. Forest Service lands and the Mt. Baker Wilderness. The lower reaches of the creek lie within state owned and Department of Natural Resources land. The proposed diversion structure would be located at an elevation of 2720 feet and have a crest of 10 feet above the existing stream bed. The structure is designed to create a 0.9 acre surface pond. The penstock or pipe from the diversion will have a total length of 6,035

feet. It will remain buried for approximately 1800 feet below the diversion structure on the east bank where it will emerge and cross the stream to the west side. From there it will remain buried for approximately 4,000 feet until it reaches the powerhouse. The powerhouse will be constructed at an elevation 1,590 feet south of a Forest Service road that roughly parallels the Middle Fork. This location is roughly half the distance of 500 to 700 feet between the mouth of Warm Creek and the road. A 30 foot riprapped tailrace channel will convey water from the powerhouse back to the stream.

II.

Bellingham Dam - Introduction

The discussion of potential anadromous fish habitat begins with the Bellingham Dam constructed in 1960. The evidence establishes that the dam serves as a complete barrier to anadromous fish. The evidence also establishes that it is extremely improbable that the dam will ever be laddered to allow anadromous fish to reach the upper Middle Fork. This fact derives from the following factors which are more fully discussed below:

- Anadromous fish pose a threat to kokanee and cutthroat trout fisheries in Whatcom Lake. The Bellingham dam diverts water to the lake and would be a pathway for anadromous fish borne pathogens to reach the lake and devastate trout populations.

- There is a lack of sufficient habitat in the highly degraded basin of the upper Middle Fork. State biologists believe that the existing habitat is barely adequate for existing resident fish runs in the basin.

- There is a lack of available steelhead and salmon stocks in the Nooksack River system to support their introduction to the upper Middle Fork. It would be unreasonable to expect federal and state agencies to put endangered and threatened runs below the Bellingham dam at risk of further demise to take advantage of marginal habitat above the dam.

- The Washington Department of Fish and Wildlife has strongly suggested that the waters above the dam be reserved in part for the future water supply needs of the Bellingham community. At present the dam does not adversely impact fishery resources. As unfortunate as the existing condition may be, not laddering the dam allows for future growth in the Bellingham community without impairing efforts to maintain and restore anadromous fish runs below the dam.

For all of these reasons the WDFW and the Governor have stated unequivocally that the State of Washington will not allow the Bellingham dam to be laddered for the purpose of introducing Anadromous fish to the upper Middle Fork. This renders any discussion of impacts from the proposal before the boards on Anadromous fish habitat speculative at best.

III.

Historic Fish Runs

At the time the Bellingham dam was constructed in 1960 there was no requirement imposed on the project to provide fish passage. This was based on the conclusion that there were no migrating fish above the falls and slides at the site where the dam was constructed. In the ensuing 36 years no one has ever found an anadromous fish above the dam. In 1959 both the Washington Department of Game and the Washington Department of Fisheries concluded that

no fish passage was necessary for the proposed dam. (R-48, R-49, and R-50) In a April 4, 1959, letter from the Department of Fisheries, (R-49), the state agency notes that the location of the dam "is essentially within the immediate vicinity of a known falls area as well as within a canyon section with a very steep stream gradient." In a subsequent letter on June 12, 1959, the Director of the Department of Fisheries stated that the "existing falls and steep gradient of the stream ... prevents migratory salmon from passing upstream." (R-51)

The boards have no basis for finding that the conclusion reached by the state agencies in 1959 was unsupported or speculative. A habitat survey of the Middle Fork (R-47) performed at the time the dam was built states:

> MIDDLE FORK OF THE NOOKSACK RIVER:
> Discharges into the North Fork of the Nooksack five miles east of Deming. Length, 22 miles. Migratory fish are able to ascend up this fork a distance of eight miles, where a falls created by an enormous slide stops upstream movement. Spawning area is quite extensive in this stream, especially in the lower parts and up, possibly five miles. There was a hatchery on this fork from 1910 to 1920. Closed now - ran out of eggs. Several tributaries enter this fork.

The falls identified at RM 8 is now the location of the Bellingham dam. The same habitat survey goes on to discuss the limited spawning habitat in the Clearwater and Galbraiter creeks above the falls (See R-116) and the absence of any migratory fish in either stream. Again, there is nothing in the record before the boards on which to base a finding that the habitat survey was not competent and reliable. There is no evidence from any other source that as of 1959 anadromous fish passed the falls at RM 8 and utilized the upper Middle Fork in any way.

The only contradictory evidence comes in a map of salmon and steelhead habitat prepared by Don Ernst, a Department of Fisheries employee in the early 40's. (Direct testimony of John Blum, at 4; R-46.) With respect to the Middle Fork the map contains the following note:

> Extremely discolored by glacial debris except in periods of cold weather - drains west slope of Mt. Baker. Stream too muddy to determine the extent of spawning in main stream, but suitable areas are plentiful. Bad falls 8 miles from fork but fish do get over. No other obstructions but terminal point of migrations is believed to be near Warm Creek. Upper areas very inaccessible and not overly well known.
>
> Tributaries extremely precipitous and generally small. Some spawning is done in the river valley flat of the mouths of these streams. Practically no spawning or rearing area in any individual tributary.
>
> Far less steelhead here than in either the North or South Fork. Area and tributaries are more limited.

In the absence of any other evidence, one can only conclude that both the 1940's survey and 1959 survey are accurate. Whatever spawning Ernst observed ten to fifteen years earlier must have been obliterated by the slide and debris noted at the RM 8 falls in 1959.

The record of Nooksack use of the Middle Fork is similarly devoid of a mention of anadromous fish present above RM 8. In a deposition of a Nooksack elder in 1950 the use of this area by the tribe was noted as being limited to hunting and berry collecting. (A-22.) The Nooksacks have not documented fishing as a traditional use of the Middle Fork in their application to the Department of Interior to have the entire Middle Fork basin designated on the federal register of historic places. (A-16, at 4.) Enthographic studies of the Nooksacks and similar peoples make no mention of fishing in the Middle Fork. (A-19, A-21, A-23, A-25, A-28,

and A-29.) The Nooksack's own consulting anthropologist, Allan Richardson noted in his 1983 study of historic Nooksack place names that "only steelhead run here" at the mouth the confluence of the Middle Fork. (A-28, at No. 95 on page 171 of the study; No. 95 is cross referenced to a map of the Nooksack River basin, A-20.) This location is near the historic village of Umptlalum or Humptlalum, a 19th Century Nooksack leader. (A-28, No. 92; see A-20.) There is no mention of anadromous fish in Edmund T. Coleman's account of his encounter with Umptlalum in 1868 during an ascent of Mt. Baker. (A-19, at page 799 of magazine article.) On the advice and with the assistance of the Nooksacks Colemen approached Mt. Baker up the Middle Fork. One of his principal encampments, named Camp Fatigue, was on the mouth of "Clear Water" Creek. (A-18, at 803.) Coleman makes no mention of salmon or steelhead in the route up the upper Middle Fork notwithstanding the fact that his party was reduced to a diet of "bread straight" (sugar, coffee and bread) by the time they had returned to Camp Fatigue. (A-18, at 815.) None of the other accounts of contact with the Nooksacks in the 19th Century offered by appellants make any reference to fishing in the Middle Fork. (A-24, A-26, and A-27.)

IV.

Bellingham Dam - Fish Runs After Construction

There have been no reports of anadromous fish above the Bellingham dam in the 36 years since the Department of Fisheries approval the diversion dam without a fish ladder. A 1975 survey of salmon utilization prepared by the Department of Fisheries indicates no salmon use of the basin above the dam. (R-31.) Likewise, a map of fish habitat incorporated into the Whatcom County Shoreline master Program (SMP) notes no habitat, spawning or rearing grounds for

anadromous fish above the dam. (A-46.) A county SMP background document affirms that the dam impedes salmon and steelhead migration. (A-47.)

The only exception to this accepted fact is found in a December 28, 1993 letter from the Department of Wildlife to the applicant stating: "This year, a fish was observed successfully passing over the dam. It was probably a steelhead or spring chinook. While not an ideal situation, anadromous fish are apparently entering and using these waters already." (R-55.) The basis for this statement is found in an incident described in a memorandum from Hal Beecher, then an employee of the Department of Wildlife, dated March 4, 1994. In the memorandum Beecher describes reports of fish jumping at the dam. There was no confirmation, however, that any fish actually made it over the dam. Beecher concluded fish could not successfully pass over the dam at the location they are reported jumping. (R-56.)

Other state employees who are familiar with the upper Middle Fork do not vary from the accepted fact that anadromous fish cannot pass the dam. (R-36, R-52, R-53 and R-54.) In responding to a hydro power proposal on Clearwater Creek the Nooksack Chairman, Hubert Williams stated: "Our Fisheries Environment Biologist has certified that at this time there are no anadromous salmonid species utilizing this creek." (R - 117). None of the agencies participating in the consultation process for the Warm Creek project, including the Lummi and Nooksack Tribes, ever claimed that the Bellingham dam was not a complete barrier to the migration of fish up stream as represented by the applicant. (R-1, at E3-5 and Table E11-2; R-3.)

The only contrary voice on this issue comes from Dale Griggs, a fisheries biologist employed by the Nooksacks. Griggs claims that during periods of high flow stronger species can navigate over the Bellingham dam. Rebutting Griggs is the testimony of the more experienced biologist John Blum. According to Blum the documented swimming strength of steelhead, the weakened physical state by the time they might reach the dam, and the height of the dam rule out any significant possibility that steelhead can physical jump the structure.

Even accepting the Griggs testimony it only creates the possibility that steelhead pass the dam. The more important and unrefuted fact is that in the past 36 years an anadromous fish has never been found above dam. This fact is not for lack of effort. The record is replete with numerous and extensive efforts to track and document salmon habitat in the Middle Fork. The Nooksacks have spent considerable time on their own habitat surveys. (Griggs direct testimony, at 6.) The applicant has conducted a thorough investigation of existing information on this issue. (R-1, Appendix E.) The state conducted a survey of salmon use in 1975. (R-31.) The county addressed habitat and use in developing the SMP. (A-46 and A-47.) This was undoubtedly a concern in the Washington State Hydropower Development/Resource Protection Plan issued in 1992. (R-40, at 4.) It is also a primary focus of the November, 1991, Environmental Assessment: Cumulative Impacts Associated with Hydropower Development in the Nooksack River Basin issued by FERC. (R-8.) Finally, the boards must consider that instream flow requirements imposed on this project assume no anadromous fish are present above the dam. (R-44.)

The overwhelming weight of evidence presented to the boards in this case results in only one possible conclusion, that anadromous fish species do not migrate into the Middle Fork above the Bellingham dam.

V.

Potential for Laddering Bellingham Diversion Dam

The possibility that the Bellingham dam might be laddered in the future is remote and speculative. Governor Lowry made this clear to the Nooksacks in a letter dated June 24, 1994:

> As a result of these concerns, I cannot commit the state of Washington to the fish passage proposals.

(R-58.) The Department of Fish and Wildlife underscored this decision to member of Governor's policy staff in a letter dated July 12, 1994. (R-59.) And, on August 5, 1994, the department wrote to the applicant stating:

> As your letter suggests, WDFW has decided not to support laddering of the dam because of concerns over potential disease introduction to trout and kokanee populations in Lake Whatcom.

(R-6; attached letter thereto dated August 5, 1994, from Brett DeMond to Lon G. Covin, Hydro West Group, Inc.)

The same letter goes on to state that the "potential remains for the dam to be laddered" based on differing opinions among state and federal agencies and tribes. In light of the basis on which the state essentially vetoed laddering the Bellingham dam, the potential described in the DeMond letter can only be taken to be slim.

Chief among the concerns expressed is the potential for injury to the kokanee trout enhancement program on Lake Whatcom. This program has been described as the most important kokanee management program in the state. (R-40.) According the cross examination testimony of Griggs, this program supports kokanee fisheries throughout the state and nation. All anadromous salmonids at some life stage commingle in the same waters and are considered carriers of viral and bacterial pathogens. (R-53.) The introduction of anadromous fish above the dam will cause the causative agent of the virus IHN to be introduced into Lake Whatcom. As a consequence, the introduction of anadromous fish in the upper Middle Fork could only be accomplished at considerable risk to the existing kokanee fishery, redesign of existing facilities and exorbitant viral sampling in the kokanee hatchery. It would also limit the ability to release any salmonids reared in the Bellingham Hatchery and perhaps even the production of fish at that facility. (R-54.) As evident from the correspondence from the Governor's office and the Department of Fish Wildlife in the summer of 1994, the benefit of reintroducing anadromous fish is outweighed by the risk to an existing and viable fishery in Lake Whatcom and impairment of enhancement programs for salmon at the Bellingham hatchery. (R-53.)

Another major concern expressed in this debate is the lack of adequate habitat in the Middle Fork above the dam to support anadromous fish. Based on a 1978 survey and on-going monitoring by state agencies the current available habitat is less than ideal for natural rearing of anadromous fish. (R-53.) In 1990 the Area Fisheries Biologist for the Department of Wildlife concluded that laddering the dam would "result in little if any net gain in anadromous fish

production for the system at this time." (R-52.) His description of the existing habitat bears careful consideration:

> I have visited many sites along the Middle Fork Nooksack upstream from the falls (location of the City of Bellingham's water diversion to Lake Whatcom completed in 1959) and many of the tributaries that flow to that section of the river. Fish rearing habitat in many of these tributaries and in the mainstem of the river have been significantly degraded due to intensive logging and logging roads on lands under the control of the Washington State Department of Natural Resources. In fact, if you look at the percentage of the basin that has been logged, you would have to conclude that if the USFS logs any of the property they administer in the basin, the remaining resident fish habitat will be degraded to the point few fish will survive.

The same letter describes further deterioration of conditions in the streams since a 1978 survey by Department of Wildlife.

A corollary of the degraded environment is its limited ability to sustain resident trout populations. Those populations are deemed to be barely holding their own and probably near the carrying capacity of the existing habitat. (R-52.) The Department of Wildlife also raised concerns in 1993 that native trout populations would also be at risk to anadromous borne pathogens. (R-53.) It seems highly improbable that it would ever be prudent to introduce anadromous fish into a basin containing marginal habitat at the risk of established native runs of trout.

The prospects for laddering the Bellingham dam are further doomed by the lack of available stock to use as a source for establishing runs above the dam. The only source of summer-run steelhead is on the South Fork. That stock is too fragile to remove any stock for transplant to the Middle Fork. (R-52.) Spring chinook runs are similarly described as being in a

critical status in the Nooksack River. (R-6; Applicant's response to Additional Information Request, at 10.)

A final concern raised by the Department of Fish and Wildlife is the future water demands of the Bellingham community. In the July 12, 1994, letter concern is described as follows:

> It is my concern that future needs of the area for water should also be factored into the equation. It is probable that Bellingham will continue to grow and will eventually need more water. It seems to be in everyone's interest to plan ahead for where that water will come from and what fishery resources will be at risk. I think the area upstream of the dam on the middle fork offers future potentials for additional water storage with minimal additional losses to fishery resources.

In the context of these concerns, fish passage to the Bellingham dam is only likely to happen if a proponent comes forward with a specific project. As of today there are no proposals for laddering the dam. If a proposal was advanced, it would only proceed if the disease problem was resolved, if suitable habitat could be found to justify the expense of introduction programs, if the proposal would not fail because of on-going damage caused by past logging projects, if available stock for transplanting could be found, if the proposal would not destroy native runs of trout, and if it can be determined that an adequate water supply to the Bellingham community can be assured without damaging fishery resource management. There are simply too many ifs in this equation, particularly given the absence of any proposal, to consider the prospect of anadromous fish in the upper Middle Fork anything but speculative and remote.

VI.

Potential Anadromous Fish Habitat at Warm Creek

The potential anadromous fish habitat at issue on Warm Creek is limited to an area between the proposed tailrace from the powerhouse to a natural barrier to anadromous fish passage upstream of the Forest Service road bridge. The habitat within this stretch is of a marginal quality. The impact of the proposal, assuming the unlikely event of the Bellingham dam ever being laddered, is primarily limited to steelhead rearing.

A cascade in the creek above the Forest Service road bridge functions as a natural barrier to the passage of anadromous fish in Warm Creek. Within the river run from this point to the confluence of Warm Creek and the Middle Fork the only potential habitat is found in a 193 foot section of the creek adjacent to the proposed location of the powerhouse. (R-65, Physical Survey Report of Potential Anadromous Barriers Skookum and Warm Creeks.) The proposed tailrace would discharge to the approximate middle of this 193 foot section. (R-35.) Upstream of this reach no spawning or holding habitat for anadromous species was found. (R-35.) The applicant did not unilaterally arrive at this conclusion. This characterization of the available habitat was the product of numerous consultations with federal and state agencies as well as the Lummi and Nooksack Tribes from December, 1990, to July, 1993. (R-1, at E3-16.) It was based on a site visit attended by the Department of Fisheries, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the Lummi Tribe. (R-65, Meeting Report July 19, 1991.) It was also based on a detailed habitat survey conducted on May 7, 1993, taken at a time when there was a flow of 40 cfs in order to evaluate spawning gravels. (Blum direct testimony, at 6; R-1 E3-1 to E3-7.) The habitat survey included measuring the width, length, gravel

composition, size, and the mean and maximum gravel depth of each patch agreed to during the consultation process as potential anadromous fish habitat. (Blum direct testimony, 6-7.)

The habitat survey done by and the testimony of Dale Griggs do not refute the habitat characterization performed by the applicant in consultation with federal and state agencies. In rebuttal testimony Blum established from the field notes prepared by tribal biologists that the area of habitat they identified was essentially the same section of the stream identified by the applicant during the consultation process. (Blum direct testimony, at 7.) In his response to the Blum testimony Griggs did not take issue with Blum analysis of the real extent of habitat but only the number of redds the potential habitat could support. (Griggs rebuttal testimony, at 3.) The weight of evidence establishes that the applicant has properly identified the extent of potential anadromous fish habitat.

The potential impact of the proposal on this potential habitat is minimal. If the Bellingham dam was laddered, the target species for introduction to upper Middle Fork would be steelhead and chinook salmon. Coho runs on the Nooksack are maintained by a hatchery program and harvested at a high rate. In the agency consultations it was concluded that the introduction of coho above the dam would not survive the high harvesting rates on the river. It was also concluded that only the larger species, i.e., steelhead and chinook salmon would be able to successfully navigate the rapids below the Bellingham dam. (R-65.)

Average rainfall and water flow in Warm Creek would result in the powerhouse being off line 93% of the time during the spring chinook spawning season from August to October. Natural flows in Warm Creek during periods when the project is off line would seldom be

adequate to support chinook spawning. Potential habitat for chinook salmon is further limited by a naturally occurring shelf at the mouth of the creek that would be difficult for chinook to traverse into the creek. Thus the project will have negligible impact on potential chinook habitat.

The potential impact on potential steelhead spawning would be more pronounced. On average, projections of flow in Warm Creek would provide insufficient flow for steelhead spawning from January to June 80% of the time. Rearing flows for steelhead would be the same as flows required for trout and would be unaffected by the project.

VII.

Mitigation

The water quality certification mitigates potential impacts on fisheries by imposing a minimum instream flow of 4 cfs from October 16 through July 15, and 14 cfs from July 16 through October 15. (R-44.) The certification protects any impact on potential anadromous fish habitat by reserving the right to modify the instream flow requirements:

> In order to assure continuing compliance with Chapter 173-201A WAC, the Department of Ecology retains the right to amend the instream flow requirements specified in this certification in the event that federally listed or anadromous fish are found to inhabitant or gain access to the project reach.

(R-44.) The same conditions were incorporated into the shoreline permit as approved by the Department of Ecology. (R-27.)

The conditions were arrived after an extensive consultation process. (R-1; at E3-16; R-3, R-37, R-38, R-71, R-73 and R-74.) The requirements were based on an IFIM study in which

state and federal agencies participated. (R-75.) The specific language was also endorsed by the Department of Fish and Wildlife and the Department of Ecology Water Resources and Technical Section. (R-41 and R-43.)

The only issue before the boards with respect to potential and anadromous habitat is water quantity. No other impact on fisheries was identified by the appellant. No evidence was presented that regulation of stream flow would not fully protect existing and potential fish habitat. Griggs admitted in his testimony before the boards that amending the instream flow to protect anadromous fish in the future would fully address the concerns of the Nooksack Tribe over the loss of potential habitat. This testimony was underscored in the Nooksack closing brief:

> While appellant agrees that a non-severable condition, reserving rights to amend the flow regime if anadromous or listed species gain access to Warm Creek, would cure this particular defect in the certification, we feel it is important that the Boards expressly modify the permit's language. Toward that end, the Boards should hold that without a non-severable reservation of flows, the certification is contrary to chapter 173-201A.

Appellant's Post-Hearing Memorandum, at 4.

There was no testimony from the applicant that potential habitat would not be protected by amending the instream flow requirements in the future if necessary. The applicant in fact stressed in argument in support of a directed verdict at the close of appellant's case that it did not object to a condition reserving the right to modify instream flows. There is thus no evidence before the boards that the reservation of right under the certification will not fully and completely protect the potential anadromous fish habitat in Warm Creek.

VIII.

Cumulative Impact

There is no factual record before the boards of other potential hydropower projects for assessment of cumulative impacts. Of 16 projects in the Nooksack River system considered in the 1991 environmental assessment, (R-8), only four projects were above the Bellingham dam. Of those projects, only two remain under active consideration; Warm Creek and Clearwater Creek. The boards were presented no evidence about the Clearwater project to support any conclusion that it would, in conjunction with the Warm Creek project, result in any adverse cumulative impact.

It is clear from the record that the siting and licensing of hydropower projects in the Nooksack River basin has been and continues to be comprehensively studied. Such projects are addressed in the Whatcom County Shoreline Master Program and from the testimony of county and state representatives active in developing the master program, hydropower projects where specifically contemplated for areas such as Warm Creek. (A-46 and A-47.) Warm Creek was also assessed and identified for hydropower development in the Hydropower Development/Resource Plan issued in 1992. (R-40, at 4.) Cumulative impacts were also addressed in the 1991 FERC environmental assessment. (R-8.) It is also apparent that the agency consultations regarding the Warm Creek project were conducted within the context of other hydropower projects. (See generally R-3 and R-65.) Finally, both the Clearwater Creek and Warm Creek projects will be subjected to an joint environmental impact statement ordered by FERC. (R-13.)

IX.

Relocation of Powerhouse

There is no evidence before the boards that location of the powerhouse upstream is feasible or that it was not adequately covered below. Only one witness, Jack Snyder, testified on this issue. Snyder was called on the basis of his pre-filed direct testimony regarding the potential for failure of the penstock and mass wasting; a specific issue raised by the appellant and listed in the Amended Prehearing Order. In response to questions beyond the scope of his direct testimony Snyder testified that he had not assessed the feasibility of locating the powerhouse upstream. The relevant portions of the Snyder testimony are attached and incorporated into these findings.

The testimony of Snyder deserves close examination. In response to questions from the appellant's attorney Snyder testified that while it was possible to locate the powerhouse upstream, he had not conducted a study to determine the feasibility of an upstream location. Ms. Krebs-McMullen pursued this issue with Snyder and elicited only the factors considered in locating the powerhouse. Mr. Kelley similarly addressed this issue in his questions of the witness. Snyder again testified that there were locations above the anadromous zone that could be "potential" locations for the powerhouse. On redirect, however, Snyder testified that he had not reviewed the habitat survey. In sum, Snyder lacked sufficient foundation to opine on and did not establish the feasibility of locating the powerhouse upstream of the proposed site.

This is an issue that was addressed in the FERC application. Locating the powerhouse upstream was rejected for consideration for several significant reasons. An upstream location would require the penstock to traverse a side flood channel creating a threat of pipe failure and

mass wasting that is successfully addressed under the current proposal. The proposed design also allows the tailrace and penstock to be aligned. Any degree of angle variation between the penstock and tailrace creates an increased potential for a rupture of the penstock. The current location also allows the tailrace to enter the creek in a parallel course to the stream that eliminates any adverse impact to the stream and potential spawning habitat from the return discharge from the powerhouse.

X.

Any conclusion of law deemed to be finding of fact is hereby adopted as such.

Based on the foregoing findings of fact, the board enters the following

CONCLUSIONS OF LAW

I.

The undersigned join our colleagues insofar as the decision of these boards affirms the water quality certification and shoreline permit approved by Whatcom County and the Department of Ecology. We depart, however, to the extent the shoreline permit is remanded to the Department of Ecology and Whatcom County for further consideration. That action exceeds the statutory authority of the Shorelines Hearings Board (SHB), is arbitrary, capricious and not based on substantial evidence before the board.

II.

The critical conclusion reached by our fellow members is found in their Conclusion of Law XV. In that conclusion the board contends that it is not enough to show that the operation of a powerhouse at the proposed location will be protective of potential anadromous fish habitat.

Rather, the applicant, appearing before us as a respondent, must demonstrate that the location of the proposed powerhouse and tailrace will provide the optimum protection for potential habitat. On this basis alone the board would remand the permit to Whatcom County for consideration of a new shoreline permit to locate the tailrace above potential anadromous fish habitat.

III.

Missing from the remand decision is any finding of fact or conclusion of law that the proposed location for the tailrace violates a regulation or policy under the Shoreline Management Act (SMP) or the Whatcom County Shoreline Master Program (WCSMP). At best the decision can only be construed to conclude that there might be another proposal that could meet the requirements of the SMA without ever approving or rejecting the permit granted by Whatcom County and the Department of Ecology. It is not within the authority of the SHB to order a party, local government and Department of Ecology to engage in a new permit application where it has not rejected the permit on appeal. The effect of directing a application in this way is to violate our charge to review local decisions. San Juan Co. v. Department of Natural Resources, 28 Wn. App. 796, 800 (1981)("the SHB is the body charged with review of the local decisions to grant or deny a development permit.") Consistent with our responsibilities an essential precedent to the remand action proposed here is a clear finding that the permit before the board is inconsistent with the SMA and WCSMP.

IV.

The remand decision improperly shifts the burden of proof to respondents. This is clear from the remand order which requires the respondents to determine "whether locating the

powerhouse and tailrace above resident and potential anadromous fish habitat is environmentally feasible." Pursuant to RCW 90.58.140(7) in any review of the granting of an application for a permit the person requesting review has the burden of proof. In this case the burden of proof rests with the Noosacks to establish that the permit granted below is inconsistent with the SMA. WEC v. Seattle, SHB No. 29; Wallingford Community Council, Inc. v. Seattle, SHB No. 203. A majority of the SHB apparently concludes that the Nooksacks did not meet their burden of proof as to the feasibility of alternative locations for the powerhouse. It is in derogation of RCW 90.58.140(7) for the SHB to redress this failure of proof by remanding the permit and placing the burden of proof on the respondents.

V.

It is apparent that there are not four members on the SHB who will find that the proposed location of the powerhouse will adversely impact fish habitat. We are nonetheless left with an improper course of action that remands a permit for consideration of an alternative location that might be as equally protective of fishery resources. It should not be surprising that a majority of the board will not find that the permitted location violates the SMA. There simply is no record before the board that would sustain such a finding. There is no documentary evidence or testimony in the record on which to base a conclusion that proposal as permitted and presented to the board will not be protective of fish habitat. There is no dispute that the numeric instream flow requirements will be protective of existing resident fish species. There is also substantial evidence in the record that anadromous fish do not utilize potential habitat in Warm Creek at this time. And, there is no dispute that amending instream flows in the future should anadromous

fish be introduced to Warm Creek will not be fully protective of the anadromous fish habitat. This was admitted by the appellant's fishery biologist and conceded by the appellant its closing memorandum to the board. In particular there is no evidence, and no party contended, that the reservation of right by the Department of Ecology would be unworkable or that the project could not be maintained and operated in compliance with any future instream flow requirements necessary to protect anadromous fish habitat.

VI.

In light of this record, the decision of our colleagues is arbitrary, capricious and violates the Administrative Procedures Act to the extent it can be construed to be a conclusion that the permit at issue violates the SMA. The SHB has an obligation to reach a decision that is based on evidence that is substantial when viewed in light of the whole record. RCW 34.05.570(3)(e). There is no evidence, let alone substantial evidence, before the boards on which to conclude that minimum stream flow regulation as insured by the water quality certification and shoreline permit conditions will not be fully protective of potential anadromous fish habitat. Thus the SHB errors by not rendering written findings of fact to support its decision. The SHB also errs by basing a decision on facts that are not in the record before the board. It is highly improper for the board to reach beyond the record presented and rely, apparently on assumptions about the operation of the powerhouse, that were not before the board factually or by argument.

VII.

Beyond the issue of whether stream flow regulation will be protective of potential anadromous fish habitat, it was also improper for the SHB to interject the issue of an alternative

location for the powerhouse into this appeal. This matter has been pending before the SHB since January 3, 1995. Prior to that the permit was appealed to the Whatcom County Hearing Examiner and Board of Commissioners. At no time during the pendency of the SHB appeal did any party raise an alternative location as an issue. From the record it is evident that this issue was raised for the first time on the last day of the final hearing primarily by two board members. Proceedings before the SHB are governed by our procedural rules codified at Chapter 461-08 WAC. WAC 461-08-140 provides that the issues at final hearing will be limited to those listed in a prehearing order unless modified for good cause shown by subsequent order. The prehearing order entered in this case also provides that the issues for final hearing will be so limited. As a matter of procedural fairness this rule allows parties to narrow the issues and adequately prepare for a hearing. By interjecting a new issue the SHB has denied the parties an opportunity to prepare and be heard. Aside from the resulting procedural unfairness the SHB has not established that good cause exists to expand the issues before the board for consideration. This particularly true where the burden of proof on the new issue is improperly imposed on the respondents.

VIII.

In the final analysis it is not clear that the parties should engage in a new shoreline permit application process below. In the procedural posture of this action the a shoreline permit is required for the project. In re Weyerhaeuser Company, 55 FERC P. 61,079 (1991). The SHB has jurisdiction in this matter only to the extent it is necessary to obtain a certification of compliance with our state coastal zone management program, the Shoreline Management Act,

under the Coastal Zone Management Act. 33 U.S.C. § 1456(c)(3)(A). Since the SHB has not specifically found that the permit on appeal violates the SMA, by default the determination by Whatcom County and the Department of Ecology that the permit is consistent with the SMA is controlling in this matter. The permit decisions made below therefore constitute a certification on behalf of the State of Washington under the Coastal Zone Management Act. This matter should accordingly proceed with the application process with FERC and any concern about alternative locations for the powerhouse should be addressed in the EIS for the Warm Creek and Clearwater Creek proposals and taken under consideration by FERC.

IX.

Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

Based on the foregoing findings of fact and conclusions of law, the board enters the following

ORDER

The appeals of the water quality certification order and shoreline permit by the Nooksack Indian Tribe are hereby DENIED.

DONE this 27th day of November, 1995.

SHORELINES HEARINGS BOARD

(See Majority Opinion – PCHB 94-148)
ROBERT V. JENSEN, Presiding

JAMES A. TUPPER, JR., Member

RICHARD C. KELLEY, Member

BOBBI KREBS-MCMULLEN, Member

(See Majority Opinion – PCHB 94-148)
DAVE WOLFENBARGER, Member

ROBERT PATRICK, Member

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, Presiding

(See Majority Opinion - – PCHB 94-148)
JAMES A. TUPPER, JR., Member

RICHARD C. KELLEY, Member